United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7171

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No. 76-7171

SEA-LAND SERVICE, INC., *et al.*,

Plaintiffs-Appellants,

—against—

AETNA INSURANCE COMPANY, *et al.*,

Defendants-Appellees.

ON APPEAL BY SEA-LAND SERVICE, INC. FROM A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT SEA-LAND SERVICE, INC.

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Jurisdiction

The opinion of the United States District Court for the Southern District of New York was entered on February 10, 1976 (84a*). Final judgment was entered on March 19, 1976 (91a). Appellant Sea-Land Service, Inc., *et al.*, filed a Notice of Appeal on March 30, 1976 (97a). The record on appeal was transmitted to the United States Court of Appeals for the Second Circuit on May 6, 1976. The jurisdiction of this Court rests on 28 U.S.C. §1291.

* References are to Joint Appendix.

Issues Presented for Review

1. Was the damage suffered by the S.S. BEAUREGARD during salvage operations after a tow line parted a General Average sacrifice?

Opinion Below

This is an appeal by Sea-Land Service, Inc., from that portion of the judgment of the Court below which failed to grant Sea-Land Service, Inc., *et al.*, General Average contribution for damage inflicted on the S.S. BEAUREGARD during the salvage operation which freed the vessel, her cargo and containers from a position aground near the entrance of Puerto de Haina, commonly referred to as Rio Haina, Dominican Republic in May 1967.

Statement of the Case

Sea-Land Service, Inc., *et al.*, brought this action to recover General Average contributions for sacrifices Sea-Land made to free cargo and containers aboard the S.S. BEAUREGARD from their perilous position aground at the entrance to Rio Haina in May 1967.

On May 5, 1967, the S.S. BEAUREGARD grounded against rubble which surrounded the breakwater at the entrance to Rio Haina.

When the vessel grounded, her bow was firmly held by the breakwater rubble. She was held in a position perpendicular to the breakwater as depicted in position "A" of plaintiffs' exhibit 1A (E-2).* The bow was firmly aground,

* References are to pages in Joint Appendix, Exhibit and Appendix Volumes.

but the stern was afloat and moving up and down with the surf.

The BEAUREGARD's master immediately hired the only available tugboat to help tow the vessel from the strand. (339a)* Ten minutes after the grounding, the tug took a mooring line from the BEAUREGARD's starboard quarter and started to pull at full speed. The BEAUREGARD's engine was ordered full astern. The BEAUREGARD started to come free, but the tow line parted before she left the strand. (89a, 90a, 339a, 379a, 385a). Unfortunately, at the time the tow line parted, the vessel was in a vulnerable position. She had moved far enough aft so that the breakwater rubble's grip on the bow had been loosened enough to permit the bow to pivot and the stern to swing to port. However, the rubble's grip on the bow had not been loosened enough to allow the BEAUREGARD to free herself from the strand. The stern then swung to the left and sustained the damages at issue in this appeal.

Defendants refused to pay their contributions as set forth in the statement of General Average on several grounds. They claimed that: 1) the vessel owner had not exercised due diligence to make her seaworthy; 2) the owner had interfered with the navigation of the vessel and ordered her to enter the port when it was unsafe to do so; 3) the initial salvage attempt was negligent; 4) the tow line passed to the tugboat 10 minutes after the grounding was unseaworthy; and 5) damage caused by the vessel's swing to port was inevitable and was therefore Particular not General Average.

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* Reference are to pages in Joint Appendix, Exhibit and Appendix Volumes.

Before the trial, defendants abandoned 3, their claim that the initial salvage attempt was negligent. At the close of the trial, defendants abandoned 4, their argument that the tow line was unseaworthy. The Lower Court decided: 1) that the vessel owner had exercised due diligence to make the vessel seaworthy for the voyage; and 2) that the owner had not ordered the Master to bring in the vessel when it was unsafe to do so. (85a-90a) Defendants have not disputed these findings.

The Lower Court decided that the damage caused by the sideward motion was not General Average damage. It is this finding that Sea-Land Service, Inc. *et al.* appeal.

This appeal centers on one narrow issue. Was the damage to the S.S. BEAUREGARD, which was caused by her sideward motion after a tow line parted during an attempt to tow her free from her perilous position aground, General Average or Particular Average damage? Plaintiffs argue that only damage which was *unavoidable* after the vessel ran aground is Particular Average damage. Since the sideward move was *avoidable,* the damage it caused is General Average damage and should be shared by defendants pursuant to the General Average statement.[1]

The defendants, on the other hand, want to expand the definition of Particular Average to include, not only *unavoidable* damage, but also *avoidable* damage which might have been caused by the initial peril without a sacrifice, even if the sacrifice which was made, narrowed the effect of the peril to the damage in question.

The Lower Court, in effect, defined Particular Average damage as any damage which, more likely than not, would

[1] The amount of damages have been stipulated and are set out in the stipulation annexed to the Lower Court's Judgment, Joint Appendix page 94a.

have been caused by the initial General Average Peril if no sacrifice had been made (85a).

Both the definition urged by the defendants and the definition used by the Lower Court are not only erroneous, but are mutually exclusive to the very theory and definition of General Average.

Three basic elements create a General Average situation:

1) The *whole venture,* ship, cargo and freight must be in peril of being lost;

2) Part of the venture must be voluntarily sacrificed;

3) The sacrifice must be successful and save at least part of the venture from the peril.

Gilmore & Black, THE LAW OF ADMIRALTY, pp. 246-248 (2d ed., 1975).

If the definition of General Average sacrifice is limited, as defined by the Lower Court, to damage which probably would not have occurred had the sacrifice not been made, a General Average sacrifice can never occur. By definition, the very thing sacrificed must be in peril of loss since the *entire venture,* including the thing sacrificed must be in peril of being lost before General Average can exist. Therefore, General Average requires that the thing sacrificed, as well as everything else, will be lost if nothing is done. Here, we have all the prerequisites for General Average.

Immediately after the S.S. BEAUREGARD's bow grounded, her master hired a tugboat to assist the vessel's engine to move the vessel astern and thus, afloat. This was the first General Average sacrifice made by Sea-Land. Ten minutes later, the tug arrived. It pulled for 10 minutes and was able to actually move the vessel some distance astern before the

tow line parted. (Lower Court's findings 89a.) The movement astern weakened the rubble's grip on the BEAUREGARD's bow but did not free it. (339a, 340a, 353a.) After the tow line parted, the vessel's stern was able to be, and was, swung against the breakwater rubble due to the surf and weakened grip on the bow. It is not disputed that damage was caused to the bottom because of the sideward swing. (Lower Court's findings, 89a.) This damage was a General Average sacrifice, because it was avoidable. It occurred because of the method chosen by the Master to free the vessel.

The District Court denied that the sideward motion damage was General Average damage because: "it is more likely than not that the ship would have shifted roughly to 'position B', regardless of whether the tow had been attempted" [2] (85a); that " . . . (I)t is more probable than not that the damage actually suffered would have occurred even if the tow had not been attempted" (87a) and that; "It was not open to the master to attempt to hold the ship in 'position A' by using 'full ahead' power and thus driving her further on to the rocks." (86a).

The first two quotations from the opinion do not reflect the proper definition of Particular Average and thus do not apply the proper test of causality to determine a General Average situation. They are, therefore, errors of law. The last quotation is not supported by the evidence and is, therefore, clearly erroneous.

The Lower Court's denial of General Average is in conflict with its following findings of fact:

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[2] Please see plaintiffs' exhibit 1A at page E-2 for an illustration of position B.

4. The vessel was struck by unexpected winds and currents and by rain squalls which obscured visibility just as the vessel approached the entrance. The grounding was caused by the effect of the natural forces upon the vessel and any miscalculation by the master and pilot was not the result of negligence on their part.

5. After the vessel grounded at 1813, May 6, 1967, her cargo, containers and the vessel were endangered by a common peril until they were finally floated free at 2108, May 8, 1967.

6. While the vessel was in her first position immediately after the stranding with her bow embedded in the breakwater, she was subject to obvious perils. She could have been holed and broken where she was, as had another vessel previously, and all might have been lost.

(Plaintiff's proposed finding of fact, no. 4, 5 & 6, incorporated by reference into the Lower Court's opinion, 85a, 73a, 74a.)

Therefore, efforts to pull the vessel from her strand were General Average sacrifices. This is not disputed.[3]

The dispute centers on the issue of whether the attempt to tow the vessel free caused the vessel to move sideward to the second position and/or whether the sideward swing was avoidable and had not occurred for all intents and purposes the moment the vessel ran aground. Either a finding that the tow attempt caused the sideward swing, *or* a finding that the sideward swing was avoidable and had not oc-

[3] Although the Lower Court held, "Based on the foregoing, it is my conclusion that no claim for general average was established." (86a), the parties realized that the foregoing findings of fact did establish a General Average situation and prepared a judgment which treated the expenses of towing the vessel free as general average expenses. (91a)

curred for all intents and purposes the moment the vessel ran aground, is sufficient to classify the resultant damage as General Average damage. The evidence shows that not only was the sideward swing avoidable, but that the towage attempt actually caused the sideward swing.

The Beauregard's bow was firmly embedded when she first ran aground. Her bow protruded about 6 feet into rocks which surrounded the breakwater of Rio Haina as she was in the position marked by the letter "A" in plaintiff's exhibit 1A (E-2) (228a). The breakwater rubble held her so firmly that she did not move for 10 minutes until the tug started to pull her free (275a-276a).

The rubble maintained a firm grip on the vessel even though her stern protruded into deeper water and was afloat. The stern rose and fell with the surf (360a-361a).

In fact, a wrecked tanker was against her port bow. She could not have swung to the port, as she did, until she was moved aft far enough to clear the tanker. Please compare the relative positions of the two vessels when in initial position A, as shown at E-2 and E-38, with the relative position of the two vessels when in the second position B, as shown at E-2 and E-38. It is obvious that the BEAUREGARD could not have moved from A to B without going astern. Therefore, the sideward motion could not have occurred without the General Average sacrifice which towed the vessel astern.

At the point in time, before first towage attempt was made, several alternatives were open to the S.S. BEAUREGARD'S master, Captain Boehm. He could have done nothing and succumbed to the peril which awaited the vessel. The vessel might then have broken apart due to the surf raising

and dropping the stern, while the bow was held immobile. If this had happened, the vessel probably would have sunk in position A and lost everything, including the cargo. If she had not broken first, one of the rocks surrounding the bow could have punctured the BEAUREGARD's hull and caused her to sink in position A. Please see plaintiffs' finding of fact no. 6 incorporated into the Lower Court's opinion by reference (88a).

Even if the action of the surf could have eventually forced the BEAUREGARD's stern over against the wrecked tanker, which was against her bow, the wrecked tanker would have prevented the Beauregard from reaching the rubble had she not been first towed astern. This wrecked, sunken tanker is shown in plaintiff's exhibit 1A, E-2, exhibit 2A-2E, E-5 through E-7, and Defendants Exhibit T, E-115.

The Master, in choosing to avoid the General Average perils, which could have completely destroyed the vessel, cargo and containers, had several options open to him. He could have ordered his engine full astern. This would have of course, tended to move the S.S. BEAUREGARD astern and free her from the strand. However, the astern order also had a disadvantage. It would tend to "walk" the stern of this single screw ship to port, towards the breakwater (258a-259a).

The Master could have and did, ask for the assistance of the one small tugboat which was available at Rio Haina at the time he ran aground. The tug could have, and did, pull the vessel with a mooring line from the starboard quarter at the same time the vessel's screw turned astern. The force of the tug tended to tow the vessel astern and also pulled against the force of the BEAUREGARD's engine's aforementioned tendency to walk her stern to the port.

The Master could have waited for large, strong salvage tugs, which were 17 hours away in San Juan, Puerto Rico, to arrive and pull the BEAUREGARD free (103a). If the Master had decided to wait for the large salvage tugs he would have taken the chance that the BEAUREGARD's bow could have been punctured or that the vessel could have broken apart during the wait.

The Master could have prevented the vessel's stern from swinging to port by either of two methods, as he waited for additional help to arrive. He could have asked the small tug present in Rio Haina to take a line from the BEAUREGARD's starboard quarter, but to only pull with enough force to hold the vessel where she was in the event she started to move, but not enough force to part a towing line (394a-397a).

The Master could also have kept the vessel in position A by coming ahead with his engine enough to "walk" the stern to starboard and thus counteract any tendency the surf might have had to force the stern to port (240a, 258a, 259a).

The Master wisely chose to immediately attempt to free his vessel from the strand with whatever help he had on hand. He ordered his engine full astern and passed a mooring line to the small tugboat which arrived 10 minutes after he stranded. The tugboat received the mooring line and started to pull from the vessel's starboard quarter (339a).

The tugboat pulled for 10 minutes and started to move the S.S. BEAUREGARD astern and into safe, deep water. Unfortunately, the mooring line parted before the vessel's bow was completely free from the strand and left the vessel in a worse position than before the tow was attempted. The vessel had not moved far enough astern to be completely

free from the breakwater rubble. The rubble still held the bow with enough force to prevent the BEAUREGARD's engines from pulling her free, but not with enough force to continue to hold the vessel firmly in place. The vessel's stern was thus able to be, and was, forced to the port by the wind and current. This movement scraped the BEAUREGARD's bottom against the breakwater rubble and placed the entire length of the vessel aground. It is the damage to the bottom caused by the sideward movement and the damage to the bottom caused by "walking" and towing the vessel from the second position which is in dispute.

Efforts to refloat the BEAUREGARD continued after the sideways movement. Plaintiff's own salvage expert, Captain Mello flew to Rio Haina to assist. The vessel was also assisted by more Dominican tugboats, a Dominican Navy Frigate and the El Morro Marine Survey & Salvage Co. Finally, at 2108 on May 8, 1967, she was floated free.

POINT I

The damage caused by the sideward movement should be defined as General Average because it was avoidable and/or it was caused by a General Average sacrifice.

The sideward movement was a General Average, not a Particular Average Act, because it was avoidable. The method of salvage chosen by the Master allowed it to occur. Although the Master did not want the vessel to move sideward, he foresaw that she could if he attempted to tow her free.

The sideward movement is also a General Average Act because the initial towage attempt, the General Average Sacrifice caused it.

It is not disputed that the necessary elements for a General Average situation existed at the moment the S.S. BEAUREGARD ran aground at 1813, May 5, 1967. She was in peril from that moment until she was freed at 2108, May 8, 1697. A voluntary sacrifice was made to free her and it was successful. Thus, the elements necessary for General Average were present, Gilmore and Black, THE LAW OF ADMIRALTY, pp. 246-248 (2d ed., 1975).

It is not disputed that the damage sustained as a result of the sideward motion should be considered a General Average sacrifice if the acknowledged sacrifice, the towage attempt, caused the sideward motion. However, the Court need not decide that the towage attempt alone, caused the sideward movement to define the movement as General Average. The Court only needs to determine that the sideward movement was avoidable when the vessel first ran aground and that the method of salvage chosen by the Master, the General Average sacrifice, allowed it to occur.

The vessel's Master reasonably foresaw the possibility of a tow line breaking during the towage attempt (378a). England's Court of Appeals has explained that any result of a voluntary general average sacrifice even though not intended, but which ought to be reasonably foreseen, is itself, a General Average sacrifice:

> If the master, when he does "the general average act" ought reasonably to have foreseen that a subsequent accident of the kind might occur—or even that there was a distinct possibility of it—then the subsequent accident does not break the chain of causation. The loss or damage is the direct consequence of the original general average Act.

> In both cases before us, *the master, when he engaged the tug, should have envisaged that it was distinctly possible that the tow-line might break and foul the propeller. When it happened, therefore, it did not break the chain of causation.*

Australian Coastal Shipping Commission v. *Green,* [1971] 1 Ll. Rep. 16, 21 (Court of Appeals 1970). (Emphasis supplied.)

See also: *Columbian Insurance Co.* v. *Ashby,* 13 Peters 331, 38 U.S. 329 at page 342 (1839); *Anglo-Grecian Steam Trading Co., Ltd.* v. *T. Beynon & Co.,* [1926] 24 Lloyd's List L.R. 122 (1926); Gourlie, GENERAL AVERAGE 13 (1st ed., 1881); Congdon, GENERAL AVERAGE 18 (2d ed., 1923); Buglass, GENERAL AVERAGE AND THE YORK/ANTWERP RULES 1950, 15 (1st ed., 1959); Lowndes & Rudolf, GENERAL AVERAGE AND YORK ANTWERP RULES, 266 (10th ed., 1975).

The Master of the S.S. BEAUREGARD did envision the possibility that the tow line to the tugboat might part and allow the BEAUREGARD to be driven ashore when in a helpless condition, e.g., pulled free enough from the rocks to permit her bow to pivot, but not free enough to allow her engines, alone, to back her free of the rocks. The parting of the tow line and sideward movement did not break the chain of causation.

The only question remaining in this appeal is: Was the sideward motion a Particular Average event or a General Average event? If the sideward motion was an *unavoidable* consequence of running aground it was a Particular Average event. If it was avoidable, it was a General Average event.

The proper definition of General and Particular Average may be obtained from their basic dictionary definition as

well as commentators' definitions. The Oxford English Dictionary, page 143 (Compact Edition 1971) defines Particular Average and General Average as follows:

> *Particular Average* is the incidence of the partial loss or damage of ship, cargo, or freight, through *unavoidable accident,* upon the individual owners (or insurers) of these respective interests.
>
> *General Average* is apportionment of loss caused by *intentional* damage to ship, e.g. cutting away of mast or boats, or sacrifice of cargo and consequent loss of freight, or of expense incurred by putting into a port in distress, by acceptance of towage or other services, to secure the general safety of ship and cargo; in which case contribution is made by the owners (or insurers) of ship, cargo, and freight in proportion to the value of their respective interests (emphasis in original).

One of the leading authorities of General Average in the United States, Leslie J. Buglass, distinguished General Average from Particular Average as follows:

> When a vessel is ashore and in a position of peril, the test as to whether damage to the hull in endeavoring to refloat is allowable in general average is *whether any extraordinary sacrifice has intentionally and reasonably been made for the common safety.* It therefore follows that if the circumstances under which a vessel stranded were such that the mere operation of refloating her would *inevitably* cause some damage to the hull, such damage is not allowable in general average.
>
> On the other hand, *if the master has a choice of action* and considers that the best course to adopt is a course which would probably result in *additional damage* to the vessel's bottom, such damage would be allowable in general average.
>
> *The question really is 'was the damage already to all intents and purposes suffered by the vessel,* so that

> the only reasonable conclusion is that it would have been present although the vessel had not been forced off but had been refloated in some other way such as by rising water level or lightening of cargo?' (Emphasis supplied.)

Leslie J. Buglass, MARINE INSURANCE AND GENERAL AVERAGE, IN THE UNITED STATES, pp. 135-136 (1973).

The Lower Court did not use the correct test to distinguish General Average from Particular Average in our situation. It did not ask whether the damage in question was "unavoidable" or whether it had for "all interests and purposes" occurred the moment the vessel ran aground. The Court stated, instead, "Here I reject a claim of General Average upon a finding that it is more probable than not that the damage actually suffered would have occurred even if the tow had not been attempted" (86a-87a). It therefore, defined the damage as Particular Average, even though it conceded that it was avoidable. It held that another kind of damage, breaking and holing, could have occurred instead of the sideward motion damage.[4]

The Lower Court's test is contrary to the very foundation of General Average. *It requires a Master to find something to sacrifice, which probably would not otherwise have been damaged by the peril.* Since no General Average situation can exist unless the *entire venture is in peril,* Gilmore & Black, *supra* at 245; *Australian Coastal Shipping Commission* v. *Green,* [1971] 1 Ll. L. Rep. 16, 18 (Ct. of Appeals 1970), nothing can ever be found to sacrifice in a

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[4] Please see plaintiff's proposed findings of fact No. 6 incorporated into the Lower Court's opinion at page 74a.

General Average situation which would not otherwise be damaged.

When choosing the element of the venture to sacrifice, the Master does not offer something new, which would not otherwise be damaged, to sacrifice. He attempts to narrow the destruction which will be wreaked by the peril to a certain item. By doing so, he saves the remainder of the venture from peril. Perhaps the difference between the Lower Court's definition of General Average and the correct definition may be best explained by a comparison to a land based hypothetical. Assume a reservoir behind a large dam is swelling to a dangerously high level. If nothing is done, the dam will break and destroy property below. The peril is the volume of water. The Lower Court's test requires us to look for something to sacrifice which would not be damaged by the water if nothing is done. To satisfy this test, we must pump the water into an adjacent valley which would not be damaged if the dam broke. But why should we have to find something new to sacrifice? Why shouldn't we be able to open a sluiceway in the dam and direct the force of the water toward a limited area to destroy? Obviously, directing the peril to a narrow area is just as much a sacrifice as affirmatively destroying something which the peril would not otherwise destroy.

This damage was certainly avoidable. If the attempted tow had been successful, and it almost was, it is conceded that the damage would not have occurred. *A fortiori,* the damage in question was General not Particular Average damage.

The case relied on by the Lower Court for its "more probable than not test" did not use a "more likely than not"

or "more probable than not" test. If anything, *The Major William H. Tantum,* 49 Fed. 252 (2d Cir. 1891) used the unavoidable test. It held a stranding unavoidable and thus Particular Average. *The Major William H. Tantum, supra,* concerned a schooner which was anchored in the "great storm" of September 1889. As the weather worsened, her anchors dragged and all but one anchor chain gave way. Only a single anchor remained and it too, was dragging. The vessel was drifting inexorably toward the beach broadside on. It was obvious that a grounding was unavoidable. The vessel's Master feared for the lives of his crew if the vessel beached broadside on. While the ultimate beaching and locality of beaching was unavoidable, the Master did have some control over the heading of the vessel as she struck the beach.

> . . . (T)he Major William H. Tantum was on the eve, . . . of going ashore. . . . (A)t the rate at which she was drifting, all the indications were that she would, in a few minutes, ground on the beach, to leeward of her, broadside to the seas. The master slipped his cable, and thus hastened the end, not averting any imminent peril of floundering in deep water, selecting no more favorable locality for stranding, and, though she struck bow on, swinging afterwards broadside to the seas; in other words, as the learned district judge expresses it, stranding her "substantially in the same place, under the same conditions, and with the same result to the cargo," though by striking bow on there was secured a better chance to save the lives of all on board. . . .

The Major William H. Tantum, supra, 49 Fed. at 252, 253.

Our situation is easily distinguished from *The William H. Tantum, supra.* When the BEAUREGARD grounded at 1813 hours, May 5, 1967, she was not on the "eve" of swinging to

port against the breakwater rubble. Her stern was not drifting inexorably to the port, and towards the breakwater rubble. In short, the BEAUREGARD could have avoided the swing to port. If the tow line had not parted, she would have avoided the swing to port and any other peril—since she would have continued to be towed aft and free of the strand and all the perils which accompanied the strand.

Judge Knapp tried to support his definition of Particular Average on the ground that it was obverse to facts he held to be General Average in *Starlight Trading* v. *S.S. San Francisco Maru,* 1974 A.M.C. 1523, 1526 (S.D. N.Y. 1974). However, the facts he held to constitute General Average in *Starlight Trading* did not reach the outer parameter of the definition of General Average. Therefore, the obverse of those facts cannot constitute the definition of Particular Average. *Starlight Trading, supra,* concerned the question of whether smoke damage to cargo was a General Average sacrifice. A fire had been detected in the vessel's cargo hold while the vessel was moored in the Port of New York. The hatch was sealed and flooded with CO_2, which extinguished the fire. Plaintiffs argued that the sealing of the hatch forced smoke to permeate the packaging of its cargo and damage the cargo.

Judge Knapp did not specifically state that smoke damage was avoidable once the fire started, thus he did not define General Average. He was not that specific. Judge Knapp held:

> Had the hatches been left open and the smoke allowed to escape, it seems to me more *probable than not* that the packaging of plaintiff's merchandise would have been sufficient to have protected it from the smoke.

Starlight Trading, supra, 1974 A.M.C. at 1526. (Emphasis supplied.)

In other words, Judge Knapp did not say that the damage *could* have been avoided had the hatches been left open, which would have defined the outer parameter of General Average. He said the damage *probably would have been avoided.* The obverse of *could have been prevented* is, of course, *could not have been prevented.* Damage which could not be prevented is the same as unavoidable damage, which is the definition of Particular Average.

An examination of *Starlight Trading, supra,* and the case upon which it relied, *Reliance Marine Ins. Co.* v. *New York & C. Mail S.S. Co.,* 77 Fed. 317 (2d Cir. 1896), discloses that they both rested on the proper avoidable v. *unavoidable* definition of General and Particular Average. General Average damage is avoidable while Particular Average is unavoidable.

The *Starlight Trading, supra,* damage was found to be avoidable, by not closing the hatches, and thus was held to be General Average damage. *Reliance Marine Ins. Co.* v. *New York & C. Mail S.S. Co., supra,* concerned smoke damage sustained by a cargo of tobacco during a fire and fire extinguishing efforts aboard a ship. The Court held that the smoke damage was not General Average because it was unavoidable. It was, therefore, Particular Average. Judge Knapp, in *Starlight Trading, supra,* relied upon, quoted and supplied the indicated emphasis as follows:

> We are . . . of opinion that, in the time during which the fire was in active operation, from 1 o'clock a.m. to 5 o'clock p.m., smoke in substantial quantities found its way without the aid of steam pressure [used to

> extinguish the fire] to the tobacco and gave to it an injurious odor, and *that if steam had not been used no part of the vessel would have been free from the pervasive effects of smoke.* (Emphasis supplied.)

Starlight Trading, supra, 1974 A.M.C. at 1526.

The portion of the above quote, which Judge Knapp emphasized, holds that the smoke damage was *unavoidable* at the time the General Average sacrifice was made, because it occurred before the sacrifice was made. The wording, in *Reliance Marine, supra,* which immediately follows the above quote, clarifies the Court's holding *that Particular Average damage is limited to unavoidable damage.*

> It must be recollected that a smouldering fire existed for 16 hours in the cargo of hemp, which could not be extinguished except by sinking the vessel, and that steam was used for 7 hours. *It seems impossible that the effect or the consequences resulting from the volumes of smoke which must have risen from the fire should not permeate everywhere, even if no steam had been used.*

Reliance Marine, supra, 77 Fed. at 319 (emphasis supplied).

Reliance Marine held the smoke damage to be Particular Average damage because it would have been "impossible" to prevent. *Starlight Trading, supra,* held damage to be General Average damage because it was *avoidable.*

The Major William H. Tantum, supra, held the grounding damage Particular Average because it was *unavoidable.* Leslie J. Buglass, in his work, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES, pp. 135-136, defined Particular Average as unavoidable, i.e. damage which was, for all intents and purposes suffered when the vessel ran

aground. The Oxford English Dictionary, p. 143 (Compact ed. 1971) defines Particular Average as "unavoidable".

The damage in question would have been avoided had the tow line not parted.

Therefore, the Lower Court should have held the damage to the S.S. BEAUREGARD, sustained when she moved sideward, to be General Average damage because the damage was avoidable.

If the Master had known that the tow line would break at the worst possible moment; after the vessel had moved enough to release the rocks' grip on the bow so that the bow could pivot and allow the stern to swing, but not enough to free the vessel, he could have used alternative means to rescue the vessel from the strand and avoid the damage which occurred.

Instead of trying to free the vessel immediately, the Master could have passed the tow line to the same tug, but ordered the tug not to attempt to tow the vessel free, only to stand by to hold the vessel in position A in case the stern did start to swing to port. The BEAUREGARD would have thus remained in her initial position until another tug arrived from the Port of Santo Domingo one and one-half hours away (452a) or until the large salvage tugs arrived from San Juan, Puerto Rico, about 17 hours away (103a).

The Master of the S.S. BEAUREGARD testified by deposition. He explained that the tug available at the time of the grounding could have been used to steady the vessel until the larger tugs arrived. However, he feared that the BEAUREGARD would have been driven further ashore if he did not

immediately tow her free. He did not say that he feared that the vessel would swing to port, but that she would have been driven further ashore. The Master probably feared, as the Lower Court held, that the vessel could have broken and/or holed while being forced against the rocks in position A.

The relevant portion (Boehm 394a-397a) of Captain Boehm's testimony reads as follows:

> Q. Tell me, sir, is it easier for a tug to hold a ship steady to keep it in a safe position rather than to try to pull it off of the rocks, to act somewhat like an anchor? A. Instead of—you mean instead of attempting to get it off, you just hold it in position?
>
> Q. Yes, could it be used in that way, as a steadying force? A. Yes, if you desired that.
>
> Q. How far away is San Juan, steaming time, from Rio Haina? A. You want that from dock to dock or from departure to arrival?
>
> Q. From San Juan to the place of your disaster. A. Steaming time was 15 hours and 12 minutes from harbor entrance to harbor entrance.
>
> Q. Now, tell me, knowing what you knew about the Dominican Navy tugs, their inefficiency, their inexperience, their old tugs, why didn't you just use them to hold the Beauregard steady until the Puerto Rico tugs could come along? A. Because I was afraid the ship was going to go further ashore.
>
> Q. Even using tugs to hold it? A. Yes.
>
> Q. With the anchor and the tugs and the line to the breakwater? A. Well, the, the anchor wasn't doing too much good then. There was only a short lead on it and it was leading aft.
>
> Q. How many tugs are permanently stationed in Rio Haina? A. I wouldn't know that.
>
> Q. You mentioned it before. A. Did I? I know there's—

Q. At least two? A. Well, yes, but—

Q. You had one, the RB 13, didn't you? A. Well, there were more than that.

Q. You had one at a time, didn't you? A. Yes, at that time.

Q. Why didn't you just let the RB 13 steady the ship until the RB 12 could come alongside and also take a line? She was right in Rio Haina. A. I think, as I remember, the RB 13 was the only one that had steam up, and it would be a good many hours.

Q. How many hours? A. I haven't the least idea.

Q. You didn't investigate that, did you? A. No, I had taken the word of my agent it would be some time before the other ones could come out.

Q. You have just told the Court, through this testimony under oath, that you thought there was a possibility of that line breaking and this ship becoming a total loss ship and cargo but you wouldn't wait a few hours for another tug; is that your testimony under oath? A. Yes, because I—

Q. That's it, yes or no. That's the testimony.

The Master could also have held the vessel in her initial position with the use of her own engine alone. The Lower Court's finding of fact No. 10 to the contrary is clearly erroneous and should be reversed since it is not supported, but is rebutted by the evidence. Finding of fact No. 10 (86a) reads as follows:

> "It was not open to the master to attempt to hold the ship in 'position A' by using 'full ahead' power and thus driving her further on the rocks."

Mr. Ganly, the naval architect who testified on behalf of plaintiffs stated that the Master could have held the BEAUREGARD in position A with her engine. No evidence contradicted the testimony.

Mr. Ganly testified as follows:

> The Witness: No vessel goes on the rocks and does nothing. This is what I don't agree with.
>
> The Court: What do you mean it goes on the rocks and does nothing?
>
> The Witness: You don't stay there and wait for yourself to be driven into a worse position. If there were no help at all available for this vessel except herself she still wasn't helpless. *She could have held her position by going full ahead with a left rudder and that would have helped to hold her.*
>
> *It's wrong to say if nothing had been done she would have gone to port. Of course she would but nobody would lay there and do nothing.* (Emphasis added.) (240a)

* * * * *

Q. You have testified that this ship could have been held on the breakwater by going ahead full ahead, and with left full rudder.

Please tell us how and why that would be true? A. The going full ahead would keep her nose into the beach and the left rudder tries to push her stern up against the sea, which is coming from her starboard quarter.

Q. That acts then like an anchor at that stage, is that true? A. Not like an anchor, it is a dynamic force.

> The Court: How does the rudder help when the ship isn't moving?
>
> The Witness: When you are going ahead the propeller pushes the water back. That is what makes the ship go. The fast running water coming by the rudder is what gives the rudder its force. With a left rudder the stern of the ship is forced over to starboard.
>
> The Court: Even if the ship isn't moving the propellers create a current which operate against the rudder?
>
> The Witness: Yes, sir. (258a, 259a)

Defendants' naval architect, Mr. Reineke, did not deny that the Master could not have held the vessel in position A with the vessel's engine alone. He only testified that the ship's engines could not have operated in such a manner for an unlimited length of time.

Mr. Reineke testified as follows:

> Q. Mr. Reineke, did you hear the testimony in this case from Mr. Ganly? A. Yes, sir.
>
> Q. That he had an option or the captain had an option of keeping this ship on the rocks by using power full forward, did you hear that? A. Yes, sir, I did.
>
> Q. Have you also learned from sitting in this trial from Mr. Ganly took I believe that this ship was damaged because sand had entered the cooling system and the stern bearing? A. Yes, this is correct.
>
> Q. What would have been the effect of running that engine for any length of time with sand entering those portions of the ship? A. Well, you are going to obviate your cooling system and once you don't have a cooling system your plant has to shut down.
>
> Q. Then the ship would be without power? A. That is correct because you don't have cooling water for your main condenser. You can't condense your steam and put your water back in your boiler. Eventually you run out of water.
>
> Q. What danger would that present to the ship in position A, the first position? A. Run her full ahead?
>
> Q. Until she goes dead. A. Then you have a dead ship on your hands.
>
> The Court: How long would it take for it to go dead?
>
> The Witness: I can't tell you. It would have gone dead ultimately because they had problems with sand in the stern bearing and sand into the sea chest and into the cooling system. It would eventually have gone dead.

The Court: It would have been a matter of days or minutes?

The Witness: From hours to a couple of days, your Honor.

Q. What elements would it be necessary for you to learn before you could determine how long that engine would run? A. A good long talk with the chief engineer at the time it was going on because he is the only one who would really have a handle on it.

Q. Do you think the master making his decision to do what he did spoke with the engineer, would that be normal good seamanship? A. Yes, sir. He has to know what he has. (270a-272a)

Obviously, the Master could have attempted the reasonable alternative and it might have worked. The Master cannot be expected to mathematically determine the probability of success of each sacrifice before making his decision. Please see Point II *infra*.

There is no evidence to support the Court's holding that it was not "open to the master" to hold the vessel in position A with her engines. Both parties agreed that the Master did act reasonably in trying to get the BEAUREGARD off the strand as soon as possible to avoid breaking up or holing.

However, General Average sacrifices are not limited to the most reasonable, or best, course of action a Master could take, *The Wordsworth*, 88 Fed. 313 (S.D.N.Y. 1898). Such a limitation would apply hindsight to the decision made by a Master while in peril. It would fetter the Master's judgment and would burden the Court with a great deal of litigation in the General Average area which is now handled

without imposing on the Courts, *Gilmore & Black, supra* at pp. 240-251.[5]

An examination of the deposition testimony[6] of the eye-witness shows that the BEAUREGARD's swing to port was not only *avoidable* had a different course of action been taken by the Master to free her, the swing was *caused* by the action taken by the Master to free her. It is therefore a General Average sacrifice.

The vessel's Master, Captain Boehm testified by deposition that the vessel's bow remained hard aground in the first position, although her stern remained afloat. Her stern rose

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[5] Messrs. Gilmore & Black, THE LAW OF ADMIRALTY, at pp. 250-251 (2d ed. 1975), credit the General Average adjuster, in the following language, with removing the burden of most General Average matters from the Court.

"It is a striking fact that litigation involving general average rarely reaches the courts any more. There have been perhaps thirty reported cases in the last twenty years, and these have been mostly concerned with the question whether general average was payable at all, and not with the deails of adjustment. Using the Rules of Practice of his Association,[18] and the insight and know-how derived from experience in a profession with a high *esprit de corps*, the adjuster performs a function which, in one sense, is judicial in character, settling claims on the facts and the law. If his profession did not exist, and his work came to the courts in great volume, they would undoubtedly find it a heavy burden to handle. But the adjusting profession does its job so well that the vast majority of the claims with which it deals are processed to the satisfaction of the community concerned, and the courts never hear of them. This phenomenon might be looked on—along with the growing practice of arbitration in all maritime cases—as part of a swing back to the medieval custom by which the members of the mercantile community adjusted their disputes among themselves, without recourse to the general judicial system."

[6] When testimony is presented in deposition, the appellate Court " . . . is in as good a position as the trial court to examine, interpret and draw inferences from their testimony." *J. Gerber & Company* v. *S/S Sabine Howaldt*, 437 F. 2d 580, 586 (2 Cir. 1971).

and fell with the swells (Boehm 360a-361a). The vessel's bow was so firmly aground that it did not move from the time she ran aground until the first tug started to tow (Boehm 375a-376a).

Although the first tug pulled for 10 minutes while the BEAUREGARD's engines was assisting, and although the vessel moved astern and her stern moved to starboard before the tow line parted, her bow remained on the strand. It never left the ground (Boehm, 339a, 379a, 385a). (Vessel's Deck Log, E-14.)

The Master feared that, had he done nothing, the ship could have been driven further ashore if the wind and waves increased (Boehm 328a, 335a). He feared that the stern could have swung into a worse position than it actually did (Boehm 328a-330a). He also feared that the vessel might break up (Boehm 328a). Captain Mello, Sea-Land's Vice President for Puerto Rico, expressed similar fears (36a, 138a, 139a, 140a, 150a, 151a).

Although Captain Torres and tugboat Captain Rojo, in response to defendant's questioning, predicted that the vessel would have shifted to port anyway, neither witness considered the alternatives considered by Captains Boehm, Mello and Mr. Ganly (Torres 417a-419a) (Rojo 449a).

Mr. Ganly, a marine surveyor and naval architect examined the S.S. BEAUREGARD's hull in dry dock after the incident. It appeared from the examination, that the vessel would not have swung to port had the towing operation not started to free her. Mr. Ganly determined that, before the towing operation started, the bow was stuck firmly aground. "(T)he vessel was well and truly with her nose in

among the rocks. She was six feet deep in the rocks" (228a). The following questions to, and answers by, Mr. Ganly leave no doubt that many things other than the sideward motion could have happened to the vessel after she first went aground. The sideward motion which did occur during the salvage operation was just one of many possibilities. It was certainly not "inevitable".

> Q. If the Beauregard, if nothing were done to her Position A would it have been likely to still go further on the rock to port, that is her stern to port and would your conclusion have changed that it was general average? A. That is a question I can't answer yes or no because I don't agree with the premise.
>
> The Court: Why don't you agree with the premise?
>
> The Witness: No vessel goes on the rocks and does nothing. That is what I don't agree with.
>
> The Court: What do you mean it goes on the rocks and does nothing?
>
> The Witness: You don't stay there and wait for yourself to be driven into a worse position. If there were no help at all available for this vessel except herself she still wasn't helpless. She could have held her position by going full ahead with a left rudder and that would have helped to hold her.[7] (240a)
>
> * * * * *
>
> The Court: . . . Just assume that at that moment everybody on the ship died so nobody could do anything, how long in your judgment would it have taken for the ship to go over to the position?
>
> The Witness: You have 10 or 15 foot swells. (242a)

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[7] Please see 259a for an explanation of the reason the vessel's stern would be forced to starboard with her engine running ahead, her rudder hard left and her bow in the rocks.

> Before she got up against the tanker she may very well have holed herself and she may very well broken in two because she had a lot of water under the stern and the forward half of her was supported. She might not have entirely gotten over against the tanker. Maybe she might have broken beforehand or flooded.
>
> The Court: In the real world you say the decision wasn't between trying to pull her off and just doing nothing but between trying to pull her off and drive her in further to hold her?
>
> The Witness: Yes. (242a)
>
> The Court: That was the mariner's decision that had to be made?
>
> The Witness: That is right. I think he made the right one. (242a)

Mr. Ganly concluded:

> (S)he could have stayed where she was and she never would have wound up where she did if she wouldn't have tried to refloat her and she wouldn't have wound up where she did if the line hadn't broken. (263a, 264a)

The Master could have held the vessel in position A and waited for assistance. Large salvage tugs were only 17 hours away and another tug, similar to the first to assist was only 1½ hours away. Captain Mello explained that salvage tugs from San Juan were alerted and could have reached the vessel within 17 hours (105a).

Defendant's own witness, Vergilice Antonia Rojo Calderon, Captain of the tugboat RB12 explained that tug RB13 was in Santo Domingo, 1½ hours away (Rojo 452a).

Defendants offered nothing to dispute Captain Boehm's, Captain Mello's or Mr. Ganly's testimony that the s/s BEAUREGARD might have broken up or holed in her initial position and the Lower Court held that she could have. If either of these two alternatives had occurred, she would have sunk where she was without moving to port. Therefore, the swing to port was not "inevitable".

All the witnesses agreed that Captain Boehm's decision to hire the available tugboat to attempt to immediately pull the vessel free was the correct decision.

All the witnesses also agreed that the Master did not intend to tow the BEAUREGARD to her second position. To the contrary, he intended to pull her free, but he did recognize that a tow line could part after she was towed far enough to lessen the breakwater's grip on the bow. He also recognized that she could drift to port if the breakwater's grip on the bow was lessened, or if the weather became worse (Boehm 328a, 368a).

The bottom damage caused by the sideward motion was avoidable and is thus part of the general average sacrifice. It was a foreseeable consequence of the salvage operations and was, in fact, a General Average Act.

POINT II

The Lower Court's decision unduly limits a Master's discretion and actually encourages a Master to sacrifice cargo when a sacrifice of part of a ship might be more economical.

The Lower Court indicated in its closing trial comments that once the BEAUREGARD ran aground on the breakwater that it would have been foolhardy to throw cargo overboard (303a, 304a-305a) or attempt to drive the vessel further into the breakwater or attempt to hold the vessel in her first position. The court specifically found (finding of fact #10) (86a) that "it was not open to the master to attempt to hold the ship in position A" and concluded that no General Average sacrifice occurred. The Lower Court appears to have rejected all alternative methods of sacrifice which it did not consider reasonable. It is submitted that such a ruling narrows the definition of General Average sacrifice to the specific sacrifice which armchair experts, using hindsight, would choose as the best means to save the vessel and cargo. Such a limitation of the definition of General Average is neither in accord with the facts of this case, nor with the principles of General Average.

A General Average situation arises when both a vessel *and* its cargo is in peril. As seen in the Lower Court's finding of fact number 6 (88a), such a peril existed in that the vessel could have holed and sunk in its first position on the breakwater. A basic principle of General Average is the giving to a Master the authority to sacrifice any part of the venture for the benefit of the whole venture. In

such a situation, the Master acts not just in the vessel's interest, but in cargo's as well. As all parties will contribute to the loss of the object sacrificed, common sense calls for the least costly sacrifice for the benefit of the whole.

Although the Lower Court, in its exercise of hindsight felt that holding the vessel's bow against the breakwater and against the wind and current with the vessel's engine or perhaps with the assistance of a tug, would have been foolhardy, such a course of action was an option open to the Master of the BEAUREGARD. This action could have been undertaken. [For further discussion of the Lower Court's clearly erroneous finding of fact #10, this Court is respectfully referred to Point I of this brief.]

Courts in admiralty have continually recognized the danger of the application of hindsight in a determination of what a vessel's Master should and/or could have done in the face of an emergency. As seen in *Sandsucker Hydro,* 1942 A.M.C. 1317 (N.D. Ohio, 1942) at page 1335:

> "There is a homely expression that 'hindsight is better than foresight.' The actions of the Master of the *Hydro* should be judged on the basis of what another navigator at that time would have done under similar circumstances. The element of excitement and inevitable confusion, with danger hovering over a Master's vessel must be taken into consideration. No doubt after the occurrence the Captain thought of many things he might have done. His negligence is not to be determined from what may have been done, or what a critic after the event says should have been done after he has had an opportunity months later to evaluate it; but rather, did he do everything at that time which reasonable good judgment dictated was necessary to save his ship and

his crew. Mr. Justice BRADLEY, in *The Nevada,* 106 U.S. 154, at p. 157, remarked:

> "Perhaps they might have done something else which would have been better. The event is always a great teacher. They might have stayed out in the river and not entered the slips, or, having entered, they might have gone back to the bulkhead, and stayed there till the *Nevada* left. But these possibilities are not the criteria by which they are to be judged. The question is, Did they do all that reasonable prudence required them to do under the circumstances? And this question, we think, must be answered in the affirmative."

See also, *S.S. Gasbras Sul,* 387 F.2d 573 (2d Cir. 1968), at page 580; *M.P. Howlett, Inc.,* 425 F.2d 619 (2d Cir. 1970) at page 622; *West Imboden,* 1936 A.M.C. 696 (E.D.N.Y. 1936) at page 704, aff'd. 88 F.2d 418.

It is submitted that the Lower Court was "Monday morning quarterbacking" in its view that no other alternatives were available to the Master of the BEAUREGARD. What presently appears foolhardy was quite likely a very possible alternative at the time of the vessel's grounding. To the extent that the Lower Court's opinion implies that no options other than towing were open to the Master, the court places all its emphasis on what *did* occur rather than what *could* have occurred.

However, the ship's master with the intent and desire to do the least amount of damage to the entire venture which encompassed both the vessel's and cargo's interests, attempted to have the vessel towed off the breakwater. The Lower Court ruled the foreseeable consequences of the towage attempt to be a Particular Average Act, not a General Average sacrifice. The Court, in essence stated that

the sideward movement was unavoidable because the only sacrifice thought to be reasonable by the Court did not prevent it. The sacrifice was neither the only alternative available, nor was the sideward movement unavoidable.

The Master chose the immediate towage attempt as the sacrifice which would cause the least amount of damage to the entire venture, cargo and ship alike.

The practical result of the Lower Court's ruling is in effect, to encourage ship's masters in the future to sacrifice cargo instead of the ship even if the sacrifice would be more costly. If the Court changes the law to deny General Average because the Court, through hindsight, does not agree with the Master's actions, the Master may be forced to make decisions more favorable to the vessel than the cargo. A Master, faced with the possibility that a Court would deny that a sacrifice of part of the vessel was General Average but would probably consider a cargo sacrifice to be General Average, would be moved to sacrifice cargo. If he sacrificed cargo and General Average was denied, cargo would bear the loss. Its loss would be due to an error of management and/or navigation for which the vessel is exonerated, United States Carriage of Goods by Sea Act, 46 U.S.C. §1304(2)(a). If the Master sacrificed his vessel and General Average was denied, the Master's employer, the vessel owner would bear the loss. It is obvious that whenever the Master had a doubt in a position of peril he would sacrifice cargo, not the vessel. The definition of General Average should not be narrowed to force Masters to sacrifice cargo, not the vessel.

The efforts expended by Sea-Land Service, Inc., *et al.*, were successful in saving all the cargo and containers at

the expense of the vessel. Sea-Land should receive General Average contribution towards the expense it incurred in towing the vessel free, the damage sustained to the vessel as it moved to position B and the damage sustained to the vessel as it was "walked" from position B. If it is necessary to distinguish the damage sustained in walking the vessel from position B, from the damage sustained by the vessel as it moved into position B, that issue should be remanded to the Lower Court to make the finding of fact.

CONCLUSION

The portion of the opinion of the Court below, which denied that the damage sustained by the S.S. BEAUREGARD during salvage operations after a tow parted, was not a General Average sacrifice, should be reversed. Sea-Land Service, Inc., *et al.*, should be awarded the stipulated sum of $404,002.26, plus interest and costs.

Respectfully submitted,

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